

Senate Bill No. 706

CHAPTER 380

An act to amend Sections 1871.7, 1879.3, and 12921.8 of the Insurance Code, relating to the Insurance Commissioner.

[Approved by Governor September 29, 2005. Filed with
Secretary of State September 29, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

SB 706, Ortiz. Insurance Commissioner: enforcement.

Existing law provides that it is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to specified provisions of law, or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer. Existing law allows a district attorney, the Insurance Commissioner, or any interested person to bring a civil action for a violation of these provisions.

This bill would require, in an action brought by an interested person, that the parties serve the commissioner and the local district attorney, within a certain period, with complete copies of all settlement agreements for actions brought under these provisions. The bill would provide that, if the commissioner has brought or proceeded with an action on or after January 1, 2006, and prior to January 1, 2011, the commissioner shall be entitled to reasonable attorneys' fees and costs in addition to any judgment. The bill would require a court, if the commissioner has proceeded with an action, and if other specified conditions are met, to determine the allocation of any judgment or settlement according to a specified priority.

Existing law requires, if the district attorney or commissioner does not proceed with an action under the above provisions, that the person bringing the action or settling the claim receive an amount that the court decides is reasonable for collecting the civil penalty and damages.

This bill would require, in addition, that the person receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs, and that these amounts be imposed against the defendant.

Existing law requires the commissioner to appoint full-time attorneys and supervisory and investigatory personnel within the fraud division of the Department of Insurance.

This bill would delete the reference to full time, and would require the commissioner, in addition, to assign staff counsel who are employed by the department and are under the supervision of the department's general

counsel to advise the department's fraud division and for other specified purposes.

Existing law allows the commissioner to issue a cease and desist order, and to impose a fine in a specified amount, against any person acting as, or holding himself or herself out as, an insurance agent or broker without being so licensed, and against any person holding out that person as transacting, or transacting, the business of insurance without having been issued a certificate of authority.

This bill would revise the circumstances in which the commissioner may issue a cease and desist order for acts of this type, and would revise the amount of the fine that may be imposed, as specified. The bill would prohibit the commissioner from imposing a fine against a person who has, without a license, acted in a capacity for which a license or registration was required, or against a person who aided or abetted such a person, unless the conduct was in intentional or clearly negligent disregard of the requirement for a license or registration.

The people of the State of California do enact as follows:

SECTION 1. Section 1871.7 of the Insurance Code is amended to read:

1871.7. (a) It is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to Division 4 (commencing with Section 3200) of the Labor Code or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer.

(b) Every person who violates any provision of this section or Section 549, 550, or 551 of the Penal Code shall be subject, in addition to any other penalties that may be prescribed by law, to a civil penalty of not less than five thousand dollars (\$5,000) nor more than ten thousand dollars (\$10,000), plus an assessment of not more than three times the amount of each claim for compensation, as defined in Section 3207 of the Labor Code or pursuant to a contract of insurance. The court shall have the power to grant other equitable relief, including temporary injunctive relief, as is necessary to prevent the transfer, concealment, or dissipation of illegal proceeds, or to protect the public. The penalty prescribed in this paragraph shall be assessed for each fraudulent claim presented to an insurance company by a defendant and not for each violation.

(c) The penalties set forth in subdivision (b) are intended to be remedial rather than punitive, and shall not preclude, nor be precluded by, a criminal prosecution for the same conduct. If the court finds, after considering the goals of disgorging unlawful profit, restitution, compensating the state for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud, that such a penalty would be punitive and would preclude, or be precluded by, a criminal prosecution, the court shall reduce that penalty appropriately.

(d) The district attorney or commissioner may bring a civil action under this section. Before the commissioner may bring that action, the commissioner shall be required to present the evidence obtained to the appropriate local district attorney for possible criminal or civil filing. If the district attorney elects not to pursue the matter due to insufficient resources, then the commissioner may proceed with the action.

(e) (1) Any interested persons, including an insurer, may bring a civil action for a violation of this section for the person and for the State of California. The action shall be brought in the name of the state. The action may be dismissed only if the court and the district attorney or the commissioner, whichever is participating, give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the district attorney and commissioner. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The local district attorney or commissioner may elect to intervene and proceed with the action within 60 days after he or she receives both the complaint and the material evidence and information. If more than one governmental entity elects to intervene, the district attorney shall have precedence.

(3) The district attorney or commissioner may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). The motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the district attorney or commissioner shall either:

(A) Proceed with the action, in which case the action shall be conducted by the district attorney or commissioner.

(B) Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person or governmental agency brings an action under this section, no person other than the district attorney or commissioner may intervene or bring a related action based on the facts underlying the pending action unless that action is authorized by another statute or common law.

(f) (1) If the district attorney or commissioner proceeds with the action, he or she shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. That person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The district attorney or commissioner may dismiss the action notwithstanding the objections of the person initiating the action if the

person has been notified by the district attorney or commissioner of the filing of the motion, and the court has provided the person with an opportunity for a hearing on the motion.

(B) The district attorney or commissioner may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the hearing may be held in camera.

(C) Upon a showing by the district attorney or commissioner that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the district attorney's or commissioner's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including, but not limited to, the following:

- (i) Limiting the number of witnesses the person may call.
- (ii) Limiting the length of the testimony of those witnesses.
- (iii) Limiting the person's cross-examination of witnesses.
- (iv) Otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the district attorney or commissioner elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the district attorney or commissioner so requests, he or she shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts, at the district attorney's or commissioner's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the district attorney or commissioner to intervene at a later date upon a showing of good cause.

(4) If at any time both a civil action for penalties and equitable relief pursuant to this section and a criminal action are pending against a defendant for substantially the same conduct, whether brought by the government or a private party, the civil action shall be stayed until the criminal action has been concluded at the trial court level. The stay shall not preclude the court from granting or enforcing temporary equitable relief during the pendency of the actions. Whether or not the district attorney or commissioner proceeds with the action, upon a showing by the district attorney or commissioner that certain actions of discovery by the person initiating the action would interfere with a law enforcement or governmental agency investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay discovery for a period of not more than 180 days. A hearing on a request for the stay shall be conducted in camera. The court may extend the 180-day period upon a

further showing in camera that the agency has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subdivision (e), the district attorney or commissioner may elect to pursue its claim through any alternate remedy available to the district attorney or commissioner.

(g) (1) (A) (i) If the district attorney proceeds with an action brought by a person under subdivision (e), that person shall, subject to subparagraph (B), receive at least 30 percent but not more than 40 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

(ii) If the commissioner has brought an action or has proceeded with an action brought by another person under this section on or after January 1, 2006, and prior to January 1, 2011, the commissioner shall be entitled to attorney's fees and costs in addition to any judgment, regardless of the date that judgment is entered. The court shall determine and award the commissioner the amount of reasonable attorney's fees, including, but not limited to, reasonable fees for time expended by attorneys employed by the department and for costs incurred. Any attorney's fees or costs awarded to the commissioner and collected shall be deposited in the Insurance Fund. In cases in which the commissioner has intervened, the commissioner and the person bringing the claim may stipulate to an allocation. The court may allocate the funds pursuant to the stipulation if, after the court's ruling on objection by the district attorney, if any, the court finds it is in the interests of justice to follow the stipulation.

(iii) If the commissioner has proceeded with an action, if there is no stipulation regarding allocation, and if a judgment has been obtained or a settlement has been reached with the defendants, the court shall determine the allocation, upon motion of the commissioner or the person bringing the action, according to the following priority:

(I) The person bringing the action, regardless of whether that person paid money to the defendants as part of the acts alleged in the complaint, shall first receive the amount the court determines is reasonable for attorney's fees, costs, and expenses that the court determines to have been necessarily incurred.

(II) The commissioner shall receive the amount the court determines for reasonable attorney's fees and costs.

(III) If the person bringing the suit has paid moneys to the defendants as part of the acts alleged in the complaint, that person shall receive the amount paid to the defendants.

(IV) At least 30 percent, but not more than 40 percent, of the remaining assets or moneys, shall be allocated to the person bringing the action, depending upon the extent to which the person substantially contributed to the prosecution of the action.

(iv) Those portions of a judgment or settlement not distributed pursuant to this subdivision shall be paid to the General Fund of the state and, upon appropriation by the Legislature, shall be apportioned between the Department of Justice and the Department of Insurance for enhanced fraud investigation and prevention efforts.

(B) Where the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award those sums that it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.

(C) Any payment to a person under subparagraph (A) or under subparagraph (B) shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(2) (A) If the district attorney or commissioner does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. Except as provided in subparagraph (B), the amount shall not be less than 40 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of the proceeds. That person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All of those attorney's fees and costs shall be imposed against the defendant. The parties shall serve the commissioner and the local district attorney with complete copies of any and all settlement agreements, and terms and conditions, for actions brought under this article at least 10 days prior to filing any motion for allocation with the court under this paragraph. The court may allocate the funds pursuant to the settlement agreement if, after the court's ruling on objection by the commissioner or the local district attorney, if any, the court finds it is in the interests of justice to follow the settlement agreement.

(B) If the person bringing the action, as a result of a violation of this section has paid money to the defendant or to an attorney acting on behalf of the defendant in the underlying claim, then he or she shall be entitled to up to double the amount paid to the defendant or the attorney if that amount is greater than 50 percent of the proceeds. That person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(3) If a local district attorney has proceeded with an action under this section, one-half of the penalties not awarded to a private party, as well as

any costs awarded shall go to the treasurer of the appropriate county. Those funds shall be used to investigate and prosecute fraud, augmenting existing budgets rather than replacing them. All remaining funds shall go to the state and be deposited in the General Fund and, when appropriated by the Legislature, shall be apportioned between the Department of Justice and the Department of Insurance for enhanced fraud investigation and prevention efforts.

(4) Whether or not the district attorney or commissioner proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of this section, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the district attorney or commissioner to continue the action on behalf of the state.

(5) If the district attorney or commissioner does not proceed with the action, and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(h) (1) In no event may a person bring an action under subdivision (e) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the Attorney General, district attorney, or commissioner is already a party.

(2) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the district attorney or commissioner before filing an action under this section which is based on the information.

(i) Except as provided in subdivision (j), the district attorney or commissioner is not liable for expenses that a person incurs in bringing an action under this section.

(j) In civil actions brought under this section in which the commissioner or a district attorney is a party, the court shall retain discretion to impose sanctions otherwise allowed by law, including the ability to order a party to pay expenses as provided in Sections 128.5 and 1028.5 of the Code of Civil Procedure.

(k) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance

of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. That relief shall include reinstatement with the same seniority status the employee would have had but for the discrimination, two times the amount of backpay, interest on the backpay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate superior court for the relief provided in this subdivision. The remedies under this section are in addition to any other remedies provided by existing law.

(l) (1) An action pursuant to this section may not be filed more than three years after the discovery of the facts constituting the grounds for commencing the action.

(2) Notwithstanding paragraph (1) no action may be filed pursuant to this section more than eight years after the commission of the act constituting a violation of this section or a violation of Section 549, 550, or 551 of the Penal Code.

SEC. 2. Section 1879.3 of the Insurance Code is amended to read:

1879.3. The commissioner shall appoint supervisory and investigatory personnel within the bureau. In addition, the commissioner shall assign staff counsel who are employed by the department and are under the supervision of the department's general counsel to advise the department's fraud division, and to further the purposes of this article and Article 1 (commencing with Section 1871). The attorneys' duties may include representing the commissioner and the department in civil lawsuits pursuant to Article 1 (commencing with Section 1871). Those persons shall be qualified by training and experience to perform the duties of their position.

When so requested by the commissioner, the Attorney General may assign one or more deputy attorneys general to assist the commissioner in the performance of these duties.

SEC. 3. Section 12921.8 of the Insurance Code is amended to read:

12921.8. (a) The commissioner may do the following:

(1) Issue a cease and desist order to a person who has acted in a capacity for which a license, registration, or certificate of authority from the commissioner was required but not possessed.

(2) Issue a cease and desist order to a person who has aided or abetted a person described in paragraph (1).

(3) Impose a monetary penalty, pursuant to an order to show cause, on a person described in paragraph (1) or (2). The monetary penalty shall be the greater of the following:

(A) Five times the amount of money received by the person for acting in the capacity for which the license, registration, or certificate of authority was required but not possessed.

(B) Five thousand dollars (\$5,000) for each day the person acted in the capacity for which the license, registration, or certificate of authority was

required but not possessed. In the absence of contrary evidence, it shall be presumed that a person continuously acted in a capacity for which a license, registration, or certificate of authority was required on each day from the date of the earliest such act until the date those acts were discontinued, as proven by the person at a hearing.

(b) Notwithstanding paragraph (3) of subdivision (a), the commissioner shall not impose a monetary penalty under this section on a person who has held a license or registration within the prior five years pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), Chapter 7 (commencing with Section 1800), or Chapter 8 (commencing with Section 1831) of Part 2 of Division 1.

(c) A person to whom a cease and desist order or order to show cause has been issued, may, within seven days after service of the order, if a hearing has not already been scheduled by the commissioner, request a hearing by filing a request for the hearing with the commissioner. The hearing shall be conducted in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and the commissioner shall have all the powers granted therein.

(d) A person who has a hearing pursuant to subdivision (c) shall be entitled to have the proceedings and the order of the commissioner reviewed by means of any remedy provided by the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code).